GREENWAY CHAMBERS

THE APPLICATION OF THE COMPANION PRINCIPLE IN WORK HEALTH AND SAFETY MATTERS

A PAPER PRESENTED AT GREENWAY CHAMBERS
WEDNESDAY, 31 MARCH 2021

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INTRODUCTION

1. It is a fundamental principle that the prosecution is to prove the guilt of an accused person. The *companion principle* is that "an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof".[2]

2. The principle of legality means that Parliament will be assumed not to have intended to abrogate these fundamental rights unless by express words or necessary implication.

3. As the High Court said in *Lee v R (No 2)*,[3] per French CJ, Crennan, Kiefel, Bell and Keane JJ (citations omitted):

> Our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in X7. The principle is so fundamental that "no attempt to whittle it down can be entertained" albeit its application may be affected by a statute expressed clearly or in words of necessary intendment. The privilege against self-incrimination may be lost, but the principle remains. The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice.

LEGISLATIVE PROVISIONS

4. Pursuant to s155 of the *Work Health and Safety Act 2011* (**WHS Act**) the regulator may, by written notice served on a person, compel that person to give to the regulator information within that person's knowledge. The notice must contain a statement about the effect of s172 (below).

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[1] I acknowledge the significant research work done by Georgia Lewer of Forbes Chambers upon which significant parts of this paper are based.
[2] *Lee v R (No 2)* [2014] HCA 20; (2014) 253 CLR 455 at [33].
[3] [2014] HCA 20; (2014) 253 CLR 455 at [32].

5. Pursuant to s171 of the WHS Act an inspector who enters a workplace may require a person at a workplace to answer any questions put by the inspector.

6. Section 172(1) provides:

> A person is not excused from answering a question or providing information or a document under this Part on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose the person to a penalty.

7. Section 173 Parliament requires warnings to be given to the person, including a warning that a failure to comply with a requirement (under s155) or to answer a question (under s171) without reasonable excuse, would constitute an offence.

8. Pursuant to s172(2) direct use in proceedings of the evidence obtained by the use of the compulsory powers is prohibited (other than on the basis of the falsity of those statements). It is in the following terms:

> However, the answer to a question or information or a document provided by an individual is not admissible as evidence against that individual in civil or criminal proceedings other than proceedings arising out of the false or misleading nature of the answer, information or document.

9. Unlike the *Work Health and Safety Act 2011* (Cth) (s172(2)(c)), the NSW Act does not contain an express term that prohibits derivative use of compulsorily acquired material.

THE ISSUE

10. Can a prosecution be taken against a personal defendant in circumstances where the prosecution has available to it information obtained from the defendant under compulsion (regardless of whether it intends to tender that evidence)?

MCANDREW V CUMMINGS

11. This issue arose in *McAndrew (NSW Department of Planning and Environment) v Cummings*.[4] Two days after a man was killed below ground in an opal mine at Grawin, near Lightening Ridge, inspectors from the Resources Regulator attended the mine site and spoke to a number of people, including Mr Cummings. Before being formally interviewed Mr Cummings made some admissions to an inspector. He was later that day formally interviewed pursuant to the power vested in the inspectors by s171 of the Act and answered questions under compulsion, during which he made some of the same admissions and further admissions. They included that he was in partnership with those conducting the mining operation, that he knew that the hoist could operate in a particular manner that was subsequently found to have been related to the cause of the death and that he was the owner of the hoist.

[4] [2020] NSWDC 590.

12. At the time he was interviewed the inspectors were gathering information and had not yet formed a belief that Mr Cummings had committed an offence. Later he provided certain information and documents in answer to a s155 notice.

13. Mr Cummings also subsequently prepared a statement at the request of a police officer which formed part of a brief of evidence for the coroner. In that statement he repeated various admissions. That statement was obtained by the regulator using its powers under s155.

14. Following receipt of that material the regulator commenced proceedings, alleging two alternative charges brought under s32 of the WHS Act based on Mr Cummings' alleged duty as a person who had management or control of the relevant plant (s21), or who had supplied that plant (s25). The compulsorily acquired material was part of the brief of evidence that was provided to the lawyers prosecuting Mr Cummings, and which was served on the defence. The s171 interview transcript was also part of the material provided to an expert whose report was relied upon by the Prosecutor to prove the nature of the risk. The prosecution indicated in advance of the proceeding that it would not be seeking to tender the s171 interview or the s155 response (ie, it would not seek to make direct use of that evidence).

15. At the commencement of the trial the defence sought a permanent stay on the basis that the prosecution had available to it, and had provided the expert with, evidence that had been compulsorily obtained, relying on the companion principle.

16. This raised two issues:

    a. Does the WHS Act permit disclosure of the defendant's s171 interview and s155 response to persons involved in the prosecution of the defendant?

    b. Given that disclosure has occurred, can the defendant have a fair trial? What measures need to be implemented for the defendant to have a fair trial?

17. In his decision on the application, Scotting DCJ set out relevant principles relevant to the first question, but ultimately determined the issue based only on the second question. His Honour found that regardless of whether or not it was permissible for the prosecution to have available to it compulsorily acquired material no relevant unfairness has arisen because the information that the prosecution had obtained under compulsion was not different or additional to that which the prosecution had obtained *other than* by use of the compulsion powers (namely from the admissions made to the inspector before interview, and the statement provided to the police officer). In those circumstances there was no relevant unfairness that would prevent a fair trial. Questions of whether any particular evidence could be tendered were questions to be considered during the course of the trial.

18. Given the outcome of the case, the two questions set out at [16] could be raised again in an appropriate case.

RELEVANT AUTHORITIES

19. The High Court and the NSW Court of Criminal Appeal have considered the application of the companion principle in a series of cases where it was asserted that these rights have been breached.

20. These authorities, which are set out in summary form below, can be said to have established the following propositions:

    a. The companion principle can be abrogated by express words or necessary intendment;

    b. The companion principle is less likely to have been intended to be abrogated in respect of any interview sought after charges have been laid;

    c. Where it is abrogated, but direct use immunity is maintained (as per s172 of the WHS Act), evidence obtained under compulsion cannot be tendered in evidence, but the use by prosecutors of such material is not prohibited;

    d. It is only where compulsorily acquired evidence was unlawfully obtained or disseminated contrary to law that questions arise as to whether proceedings ought be stayed, or other relief granted; and

    e. The Court would need to be satisfied that the continued prosecution of the Defendant would bring the justice system into disrepute before it would issue a stay of proceedings.

X7 v Australian Crime Commission

21. The X7 cases concern the question of use of a compulsory power to answer questions after a person has been charged.

22. In *X7 v Australian Crime Commission,*[5] the High Court considered the regime established by the *Australian Crime Commission Act 2002* (Cth). The Australian Crime Commission (**ACC**) had powers under that Statute to compulsorily examine persons. Section 25A(9) of that Act mandated that a direction must be made to prohibit dissemination of such compulsorily obtained evidence if it might prejudice the fair trial of a person who had, or might be, charged with an offence. Such a direction would prohibit prosecutors and officers investigating a crime from receiving copies of that compulsorily obtained evidence.

23. The High Court was concerned not with any criminal trial but whether the ACC could examine a person at a time *after* they had been charged with a criminal offence. The Court held (by majority) that the legislative provisions in question did not permit that to be done. The legislative provision that enabled the ACC to require a witness to answer questions on compulsion was silent as to whether that power could be used after a

[5] [2013] HCA 29; (2013) 248 CLR 92.

person was charged. The majority held that in the absence of express words, no such power existed.

X7 v R

24. Following the decision of the High Court in *X7 v Australian Crime Commission* the defendant sought a permanent stay before the District Court on the basis that he had been compulsorily interviewed after he had been charged, which was a contempt of court. The Judge refused the application. He then took the issue to the NSW Court of Criminal Appeal on a stated case.[6]

25. The CCA emphasised the rarity in which the Court would order a permanent stay. The question of whether to stay required consideration to be given to the nature and extent of any unfairness to an accused. The Court concluded that there was no warrant for a permanent stay in that case.

26. Bathurst CJ, with whom each member of the Court agreed (Beazley P with additional reasons) held:

> [109] In these circumstances, it does not seem to me that either the decision in *X7 (No 1)* or in *Lee (2014)* compels the conclusion that the fact of an unauthorised examination, on its own, requires an order that there be a permanent stay of criminal proceedings relating to the matters the subject of the examination. To grant a stay in such a case would be to grant one without regard to the nature and extent of the unfairness which results. It would also fail to take into account the interests of the community in the prosecution of serious criminal offences.
>
> [110] If in fact the examination was productive of actual unfairness, it seems to me the person affected would be able to establish that fact without suffering further unfairness or injustice. In the present case an application could be made under s 25A(10) of the *ACC* Act to vary the direction previously made, so that the content of the examination could be released to a judge hearing the application for a stay, to enable it to be determined if there was any actual unfairness in the particular case. This was the course adopted in *R v Seller* at [35] and *R v X* at [7].
>
> [111] In reaching the conclusion that a permanent stay should not be granted, I am conscious that what occurred was a contempt of court which cannot be purged. However, there is nothing to suggest that the examination was not conducted by the ACC in the bona fide belief that it was authorised by the *ACC Act*. In these circumstances it does not seem to me that the continuation of the criminal proceedings would bring the administration of justice into disrepute or that a stay was necessary to protect the court process from abuse.

27. Beazley P also noted that the Court was not able to determine whether a Judge, in the conduct of the trial, would be able to relieve against the unfair consequences (if any) flowing from the unlawful compulsory examination of the applicant since the Court was

[6] *X7 v R* [2014] NSWCCA 273; (2014) 246 A Crim R 402.

unaware of the nature of the questions that had been answered in the compulsory interview and whether they in fact bore upon issues going to his guilt.

Lee v NSW Crime Commission

28. In *Lee v NSW Crime Commission*,[7] the Court considered the operation of the *Criminal Assets Recovery Act 1990*, which permitted the Supreme Court (on application from the NSW Crime Commission) to undertake compulsory examinations to make confiscation orders. The Commission had sought to examine persons after they had been charged with criminal offences.

29. The High Court held (by majority) that the statute empowered the Court to conduct compulsory examinations, even after charge, including on topics related to pending criminal proceedings.

30. The Court found that the express words of the Act expressly abrogated the privilege against self-incrimination such that the defendants could be examined as to matters relevant to the criminal offences for which they had been charged.[8]

Lee No 2

31. In *Lee v R,*[9] the High Court considered a conviction after trial of two accused. Before the commencement of the trial transcripts of the compulsory examinations of the two accused by the NSW Crime Commission had been disseminated to investigating police and the prosecution. Critically, s13(9) of the *New South Wales Crime Commission Act 1985* prohibited dissemination (by direction) if dissemination would prejudice a fair trial. The Crown conceded the dissemination to the prosecution had contravened that provision.

32. The Court concluded that the wrongful dissemination of the lawfully acquired evidence meant the accused's trial had been altered in a fundamental respect which in turn led to a substantial miscarriage of justice requiring the convictions to be quashed and a new trial ordered. (It is notable that it did not lead to a permanent stay).

Strickland v DPP

33. In *Strickland v DPP (Cth)*,[10] the High Court considered an appeal from a trial judge's decision to permanently stay proceedings. In that case, there had been compulsory examination by the ACC. The trial judge found that there had been a deliberate decision by the Australian Federal Police (**AFP**) to have the ACC use its compulsory powers to obtain a forensic advantage. The examinations were observed by the AFP and later transcripts disseminated to them and the Commonwealth Director of Public Prosecutions. The ACC did not make orders prohibiting the disclosure (and accordingly the use of such material) as it was required to do under s25A of the *Crime Commission Act.* For these reasons, the Court found a stay was justified. On appeal, the Court of

[7] [2013] HCA 39; (2013) 251 CLR 196.
[8] Cf. the legislation in *X7*.
[9] (2014) 253 CLR 455.
[10] [2018] HCA 53; (2018) 272 A Crim R 69.

Appeal found that the examinations were for an improper purpose of assisting the AFP investigation and therefore the examination and the disclosure of the material was unlawful. However, the Court of Appeal found that this had not resulted in any forensic disadvantage to the accused. The High Court (by majority) held that there was such a forensic disadvantage and ordered the trial be permanently stayed.

34. Key to the reasoning was that the gathering of the evidence by the ACC to be used by the AFP had been unlawful and intentionally so.[11]

35. It is notable that the High Court was careful to distinguish the situation from one where the compulsory powers had been used *lawfully* (as in the next case considered in this paper: *R v IBAC*[12]). Kiefel CJ, Bell and Nettle JJ at [77] held:

> In *IBAC*, the common law right to silence was beside the point because it was *lawfully* overridden by the examiner's exercise of compulsive powers, under statute, for the purpose for which the statute provided, and otherwise in accordance with the statute. Here, the common law right to silence is very much to the point because Sage did not exercise his compulsive powers under the ACC Act lawfully for the purpose for which the ACC Act provided but for the extraneous unlawful purpose of assisting the AFP to compel the appellants to give answers to questions about offences of which they were suspected and in relation to which they had exercised their common law right to silence.

36. See also Gageler J (in minority) at [132]:

> Had the examinations been lawful, direct use of the testimony in the trial would have been prohibited by the ACC Act. Had the examinations been lawful, derivative use of the testimony (in the sense of use of information contained in the testimony to obtain or assemble other evidence to be tendered at trial) would not have been prohibited by the ACC Act, except to the extent that a practical limitation on derivative use might have arisen from such restriction on communication as might have been imposed by a valid non-publication direction.

37. Strickland had some features that do not arise, or are very unlikely to arise, in respect of a WHS proceeding:

    a. The compulsory examination was conducted after charge.

    b. The compulsory examination was conducted after the accused refused to participate in interview under caution.

    c. The improper use of compulsory powers "infected the exercise of compulsory power with illegality at every stage".[13]

    d. The examinations were conducted for a purpose ulterior to the statutory purposes for which the AFP was given the power.

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[11] See Kiefel CJ, Bell and Nettle JJ at [77]-[78], [86], [88], [101], [107]; Keane J at [172]-[173] and Edelman J at [250]-[254].
[12] *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459.
[13] At [102].

e. The examinations were for the **purpose** of obtaining a forensic advantage to assist the prosecution in the pending proceedings.

f. The non-publication order further undermined the accused's rights.

g. There was wide-ranging and undocumented dissemination.

R v IBAC

38. In *R v Independent Broad-Based Anti-Corruption Commissioner*,[14] the High Court considered the *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic) (**IBAC Act**). That Act permitted the Independent Broad-based Anti-Corruption Commission (**the IBAC**) to compulsorily examine persons, including in public.

39. Two police officers, who had been suspended and believed they may become the subject of criminal proceedings, sought orders preventing IBAC from compulsorily examining them.

40. Section 144(1) of the IBAC Act abrogated the privilege against self-incrimination in essentially the same terms as s172 of the WHS Act, requiring answers to be given but preventing those answers being used against the person in future proceedings (direct use immunity).[15]

41. The plurality (French CJ, Keifel, Bell, Keane, Nettle and Gordon JJ) noted the companion principle[16] and then said at [48]:

> In the present case, the companion principle is not engaged because the appellants have not been charged; and there is no prosecution pending. The appellants urge the Court to extend the principle. For a number of reasons, that suggestion should not be accepted.

42. The plurality concluded that the *IBAC Act* authorised the examination of the persons who may be subsequently charged.

43. In a separate judgment, agreeing with the outcome Gageler J held that the IBAC Act manifested an unmistakable legislative intention that a person summoned and examined can be a person whose conduct is the subject matter of the investigation.[17] Then at [75] his Honour said:

> The exclusion of a person whose corrupt conduct or criminal police personnel misconduct is the subject-matter of the investigation would, moreover, reduce to nonsense the IBAC Act's solemn abrogation of the privilege against self-incrimination and with it the consequent conferral of direct use immunity. The purpose of the abrogation of the privilege against self-incrimination, to adopt the explanation in the statement of compatibility, is to assist the IBAC as a truth-seeking body to undertake a full and proper investigation.

[14] [2016] HCA 8; (2016) 256 CLR 459.
[15] See decision at [25].
[16] At [43]-[46].
[17] At [73].

Macdonald v R

44. The WHS Act is in some (but not all) respects akin to the *Independent Commission Against Corruption Act 1988* (**ICAC Act**). That Act provides powers, *inter alia,* under s30 to compulsorily examine witnesses. Subsections 37(2) and (3) (in terms similar to s172(2) of the WHS Act) prohibits the evidence being used against the person in any proceedings (other than where there is express provision – s37(4)). There are powers under s112 to prohibit the publication of evidence. There are no such powers in the WHS Act.

45. In *Macdonald v R; Maitland v R*,[18] the Court of Criminal Appeal considered an appeal from a refusal to permanently or temporarily stay proceedings. In that case, evidence had been compulsorily obtained by the ICAC from both accused. The Court of Criminal Appeal upheld the trial judge's refusal to grant a stay. Part of the argument turned on whether the provisions of the ICAC Act abrogate the accusatorial principle to the extent that they permit the dissemination of compulsorily obtained material. Bathurst CJ observed (with whom RA Hulme and Bellew JJ agreed) that:

> [98] Section 37 of the ICAC Act provides, in effect, that if objection is taken, the answers given are inadmissible in any civil, criminal or disciplinary proceedings. By contrast to s 26, it does not prohibit use being made of such answers in the proceedings. Thus, on the face of it, the answers could be used to test answers given in subsequent proceedings. This again tends to suggest a legislative intention to abrogate the accusatorial principle.
>
> …
>
> [101] The applicants each submitted that s 112 demonstrated a legislative intention to preserve the accusatorial principle. I do not agree. That submission assumes that the accusatorial principle is the only relevant public interest criteria to be taken into account. This is not necessarily the case. As I have indicated, one of the objects of the Act was to bring corruption into the light of day. It may be that the Commission could conclude that, in particular circumstances, it was in the public interest that that be achieved notwithstanding the accusatorial principle. The question is hypothetical as no application under s 112 was made. However, what it does demonstrate, in my opinion, is that the accusatorial principle is abrogated at least in circumstances where the Commission determines it is not in the public interest to make an order prohibiting the publication of the evidence in question.

NSW Food Authority v Nutricia Australia

46. The temporal distinction between investigation and charge is also consistent with a NSW line of authority regarding the issue of compulsory notices to accused persons which pre-dates the decision in *X7*. In *NSW Food Authority v Nutricia Australia Pty Ltd*,[19] the Court of Criminal Appeal considered compulsory powers under a regulatory regime (with some similarities to the WHS Act), the *Food Act 2003,* and, in particular,

[18] [2016] NSWCCA 306.
[19] [2008] NSWCCA 252; (2008) 72 NSWLR 456.

s37 of that Act and the issue of compulsory notices. In that case, the Court concluded that in the absence of clear statutory language, such compulsory powers could not be exercised against a defendant after the commencement of criminal charges (but could be used before such point). In relation to such power, Spigelman CJ, with whom Hidden and Latham JJ agreed, stated:[20]

> In my opinion, the significant role in protecting the public that is served by the exercise of the powers in s 37(1)(o) and s 37(1)(q) of the Food Act is such that this Court should conclude that Parliament necessarily intended that the powers could be exercised for purposes of determining whether charges should be lain and to do so even if the prosecution may obtain an indirect advantage in extant criminal proceedings.

R v OC

47. In *R v OC*,[21] the Court of Criminal Appeal overturned a temporary stay of proceedings (until new solicitors were appointed) that had been granted by the trial judge. The accused in that case was charged with insider trading. A transcript of an examination of the accused under s19 of the *Australian Securities and Investments Commission Act 2001 (Cth)* has been given to the CDPP as well as its solicitors and counsel.[22]

48. Section 76 of the ASIC Act provided:

> **76 Statements made at an examination: proceedings against examinee**
>
> (1) A statement that a person makes at an examination of the person is admissible in evidence against the person in a proceeding unless:
>
> (a) because of subsection 68(3), the statement is not admissible in evidence against the person in the proceeding; or
>
> (b) the statement is not relevant to the proceeding and the person objects to the admission of evidence of the statement …

49. Section 68 provided:

> **68 Self-incrimination**
>
> (1) For the purposes of this Part, of Division 3 of Part 10, and of Division 2 of Part 11, it is not a reasonable excuse for a person to refuse or fail:
>
> (a) to give information; or
>
> (b) to sign a record; or

[20] At [171].
[21] [2015] NSWCCA 212; (2015) 90 NSWLR 134.
[22] At [6].

(c) to produce a book;

in accordance with a requirement made of the person, that the information, signing the record or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty.

(2) Subsection (3) applies where:

(a) before:

(i) making an oral statement giving information; or

(ii) signing a record;

pursuant to a requirement made under this Part, Division 3 of Part 10 or Division 2 of Part 11, a person (other than a body corporate) claims that the statement, or signing the record, as the case may be, might tend to incriminate the person or make the person liable to a penalty; and

(b) the statement, or signing the record, as the case may be, might in fact tend to incriminate the person or make the person so liable.

(3) The statement, or the fact that the person has signed the record, as the case may be, is not admissible in evidence against the person in:

(a) a criminal proceeding; or

(b) a proceeding for the imposition of a penalty other than in proceedings in respect of:

(c) in the case of the making of a statement — the falsity of the statement; or

(d) in the case of the signing of a record — the falsity of any statement contained in the record.

50. Section 63 made it an offence to refuse to answer questions at examination.

51. These sections operate in a similar way to ss172 and 173 of the WHS Act in that they abrogate the privilege against self-incrimination, but strike a balance by giving direct (but not derivative) use immunity for the information given. The difference between the statutes is that the ASIC Act provisions requires an objection to be taken for the immunity to flow. The WHS Act provisions do not require an objection and provide the immunity automatically.

52. In *OC,* the accused had objected to giving the information on examination on the basis of self-incrimination. The examination was therefore not admissible against him at trial. The complaint made however, was that access by the prosecution to his answers undermined the companion principle and his right to a fair trial.

53. Sections 16, 17 and 18 of the ASIC Act permitted disclosure to various parties of reports about the ASIC investigations, including the AFP and the CDPP but not the transcripts themselves. (Note this is different to the WHS Act where there is no provision relating to such disclosure because the regulator is the prosecutor).

54. The Court noted that there was no express provision in the Act permitting transcripts of examinations to be provided to the prosecutor.[23] The Court held however, that fact that s76 contemplated that material might be admitted into evidence meant that the legislature had, by necessary implication, abrogated the companion principle. Bathurst CJ (with whom RA Hulme and Bellew JJ agreed) held:

> [107] There remains however the question of whether the use of the record of the examination is limited to making an informed decision on whether to lay charges or whether use could be made of the record in the subsequent conduct of the prosecution. Viewed in isolation, I do not think that s 49, coupled with the powers vested in ASIC in Pt 3 Div 2 (ss 19–27) of the ASIC Act, necessarily implies that the latter is the case. The Act is silent as to the use that the CDPP can make of the material and limiting its use to the consideration of laying and formulation of charges does not render it inoperative or meaningless. Although such a limitation would doubtless cause some inconvenience and difficulty to prosecuting authorities, as I have pointed out, it is not enough that the implication may seem desirable.
>
> [108] However, the Act also expressly contemplates that evidential use may be made of the examination. It is necessary to consider whether these provisions necessarily imply that the transcript of the examination can be made available to the prosecutor for the purpose of carrying out the prosecution.
>
> …
>
> [112] In my opinion, s 76(1)(a) of the ASIC Act cannot be confined in the manner suggested by the primary judge. Relevantly, s 76(1)(a) makes statements at an examination admissible unless s 68(3) applies. It is a precondition to s 68(3) both that privilege was claimed in respect to the statement at the examination and that the statement tends to incriminate. Unless both of these preconditions apply, s 68(3) has no operation.
>
> [113] Section 68(3)(c) and (d) operate as exceptions to the exclusionary provisions in s 68(3)(a) and (b). In proceedings in respect of the falsity of a statement, the statement is admissible irrespective of whether privilege is claimed at the examination and whether or not the statement may be self-incriminating.
>
> …
>
> [119] Once it is accepted that statements made during a s 19 examination are admissible in criminal proceedings, unless the two preconditions in s 68(2) are met, and that the time for determining whether these conditions are satisfied is at the time the statements are sought to be tendered in evidence, it follows, as a matter of

[23] At [103].

> necessary implication, that the CDPP officers responsible for the conduct of the proceedings are entitled to have access to the examination transcripts, not only to formulate charges, but to prosecute them. This access would enable CDPP officers to consider whether the privilege was properly claimed on any answer and whether the transcript could be tended. Her Honour, with respect, erred in reaching a contrary conclusion.
>
> [120] The alternative construction propounded by the respondent (see [90] above), suggesting that it was not necessarily implicit that the CDPP was entitled to have access to the transcript, as a separate "voir dire team" could be engaged by the prosecution, derives no support from the terms of the legislation. Rather, the ASIC Act, particularly s 49, in conjunction with s 68, s 76 and s 77, in my view, discloses, by necessary intendment, that if a prosecution is caused to be commenced or carried out by ASIC, the prosecutors may be given access to the transcript of a s 19 examination and, subject only to the prohibition against the direct use of self-incriminating material in s 68, can use it for the purpose of the prosecution.

55. For these reasons the appeal was upheld and the stay overturned.

56. An application for special leave to appeal to the High Court was refused.

57. There are obvious relevant difference between the ASIC Act and the WHS Act. The key difference is that the ASIC Act permitted compulsorily obtained evidence from the accused to be used against him/her in on more occasions than what the WHS Act contemplates.

58. However, there are some similarities, including that both Acts permit such evidence to be used directly against an accused in proceedings directly relating to the falsity of the information given and both only provide for direct and not derivative use immunity.

R v Leach

59. While not binding, some support for the proposition that the companion principle may prevent a prosecution under the WHS Act from proceeding where compulsorily acquired material is held by the prosecution may come from *R v Leach*,[24] a decision of the Queensland Court of Appeal regarding provisions of the *Taxation Administration Act 1953* (Cth) (as in force as at February 2010).

60. Pursuant to s353-10 of Sch 1 of that Act, the Commissioner for Taxation could require a person to attend and give evidence for the purposes of administration of the taxation law. Not to do so was an offence.

61. Disclosure was made by the ATO officer to a separate entity, the Commonwealth DPP.

62. Section 355-5 of Sch 1 prohibited disclosure of information obtained via this examination process.

[24] [2018] QCA 131; (2018) 334 FLR 224.

63. However, s355-50 of Sch 1 provided exemptions. It was in the following terms:

355-50 Exception—disclosure in performing duties

(1) Section 355-25 does not apply if:

(a) the entity is a taxation officer; and

(b) the record or disclosure is made in performing the entity's duties as a taxation officer.

Note 1: A defendant bears an evidential burden in relation to the matters in this subsection: see subsection 13.3(3) of the Criminal Code.

Note 2: An example of a duty mentioned in paragraph (b) is the duty to make available information under sections 3C and 3E.

(2) Without limiting subsection (1), records or disclosures made in performing duties as a taxation officer include those mentioned in the following table:

Records or disclosures in performing duties		
Item	**The record is made for or the disclosure is to ...**	**and the record or disclosure ...**
1	any entity, court or tribunal	is for the purpose of administering any *taxation law.
2	any entity, court or tribunal	is for the purpose of the making, or proposed or possible making, of an order under the *Proceeds of Crime Act 2002* that is related to a *taxation law.
3	any entity, court or tribunal	is for the purpose of criminal, civil or administrative proceedings (including merits review or judicial review) that are related to a *taxation law.
4	any entity	is for the purpose of responding to a request for a statement of reasons under the *Administrative Decisions (Judicial Review) Act 1977* in relation to a decision made under a *taxation law.
5	any entity	is for the purpose of: (a) determining whether to make an ex gratia payment; or (b) administering such a payment; in connection with administering a *taxation law.
6	any entity	is for the purpose of enabling the entity to understand or comply with its obligations under a *taxation law.
7	the Secretary of the Department	(a) is of information that does not include the name, contact details or *ABN of any entity; and

Records or disclosures in performing duties		
Item	**The record is made for or the disclosure is to ...**	**and the record or disclosure ...**
		(b) is for the purpose of: (i) the design of a *taxation law; or (ii) the amendment of a taxation law.
8	any board or member of a board performing a function or exercising a power under a *taxation law	is for the purpose of performing that function or exercising that power.
9	a competent authority referred to in an international agreement (within the meaning of section 23 of the *International Tax Agreements Act 1953*)	is for the purpose of exchanging information under such an international agreement.
10	any employer (within the meaning of the *Superannuation Guarantee (Administration) Act 1992*)	is for the purpose of disclosing to that employer information included in a notice given to the Commissioner under subsection 32F(1) or 32H(1A) of that Act by an employee (within the meaning of that Act) of that employer.
11	a payer (within the meaning of Part VA of the *Income Tax Assessment Act 1936*) in relation to whom an individual has made a *TFN declaration that is in effect	(a) is of a matter that relates to the individual's income tax or other liability referred to in paragraph 11-1(b), (ca), (cb), (cc), (cd), (da) or (db); and (b) is for the purpose of assisting the individual to give a declaration under section 15-50 to the payer; and (c) is made as the result of a request made by the individual to the Commissioner

64. Another provision of that Act also permitted disclosure if the disclosure is to an "authorised law enforcement agency officer or a court or tribunal"[25] and is for the purpose of:

a. investigating a serious offence; or

b. enforcing a law, the contravention of which is a serious offence; or

c. the making or proposed or possible making, of a proceeds of crime order, or

d. supporting or enforcing a proceeds of crime order.

65. The CDPP was not such a law enforcement agency officer as defined.

[25] Section 355-70.

66. That Act contained no express provision for the ATO to prosecute the offences. It contained no express provision for such information to the provided to the CDPP.

67. The offences charged were dishonesty offences under the Commonwealth Criminal Code. They were not offences under the *Taxation Administration Act* and so it is arguable that the disclosure could not be for the purposes of administering the taxation law".

68. The possible exception that applied to permit disclosure to the CDPP was that it was an "entity" and the disclosure was made "for the purpose of criminal, civil or administrative proceedings". On this basis, trial judge found that the provisions permitted the disclosure.[26]

69. The significant difference in *Leach* as compared to the other authorities is that the prosecution used (indeed, heavily relied upon) the evidence at trial. All the other authorities concerned no direct use of the materials but access to them by those involved in the prosecution. This was a significant matter for the majority (Sofronoff P, with whom Appelgarth J agreed, Philippides JA dissenting), who held:[27]

> Having properly obtained information by compulsion at a time before charges were laid, the respondent [the Crown] then improperly used that material to assist in the prosecution of the appellant [Mr Leach], including by tendering it as part of the Crown case.

70. The reasoning of the majority is that there is nothing in the text of the statute which suggests that the objects of the *Taxation Administration Act* would be defeated if s355-50 were confined not to include use of information from a putative criminal defendant to a prosecutor. In other words, that there is no necessary implication that the companion principle be overridden. At [103], Sofronoff P held (emphasis added):

> The express objects of Div 355 and the general language of s 355-50 do not give rise to a necessary implication that the fundamental principle identified in *X7* has been abrogated. For tax related offences there is no indication that the objects of the legislation, as expressed in s 355-10 or as implied by the text of Div 355 itself, would be defeated if the general language of s 355-50 were read as not permitting the use by the prosecution in this case of the evidence obtained from the accused about the subject matter of what later became the charges against him and, as I have said, no such submission was advanced by the respondent on appeal.

71. The real question for the Court in the case was whether, by necessary implication, the statute permitted use of the material at trial (not merely disclosure to the prosecutor). While there was a power in s355-50 to disclose the material, it did not extend to use of the material.[28]

72. There are many bases on which to distinguish *Leach* from a case arising under the WHS Act. These include:

[26] At [129].
[27] At [78].
[28] At [89].

a. The decision was concerned with whether the construction of the Statute necessarily abrogated the use of material against an accused at trial. To that end, it was not concerned with the question of whether as a matter of construction it merely permitted dissemination to a prosecutor but not use by it. This is a highly significant difference in the task undertaking in construing what the disclosure provisions meant.

b. The statutory regimes are entirely different, with Parliament in the WHS Act having clearly articulated through careful drafting how competing interests are to be balanced in how processes are to be conducted and how the evidence can then be used. The actual question in *Leach* (can the material be used against an accused) has clearly been answered in the WHS Act (it cannot).

c. To the extent that the decision was concerned with the disclosure provisions, the case involved dissemination to another entity which was not expressly provided for under the Act. Ordinarily in WHS cases there is no dissemination to any other person other than the entity that exercised the compulsory power who subsequently conducts the prosecution (and its entities).

d. It could be said that, in contrast, the "objects" of the WHS Act would, in fact, be entirely defeated if one of the few entities entrusted to commence criminal proceedings under the Act (and the only entity entrusted to conduct compulsory procedures under the Act) could not prosecute once such procedure was undertaken in relation to a person subsequently charged with an offence under that Act.

Kinghorn

73. The scope of *Leach* was averted to recently in the NSWCCA in *Director of Public Prosecutions (Cth) v Kinghorn; Kinghorn v Director of Public Prosecutions (Cth)*.[29] In that case, the CDPP contended that the decision could be distinguished as *Leach* concerned dissemination to a prosecutor for the purpose of a fraud charge, whereas *Kinghorn* concerns an offence of making a false statement during the examination by the ATO and as such is direct evidence of the alleged offence committed.[30] However, the CCA did not need to consider this argument because the case was concerned only with access to materials on subpoena to make such an argument, not the argument itself.

74. At the conclusion of the appeal, the matter was remitted to the trial judge (Adamson J). The proceedings are now at a stage where a question relating to *Leach* has been, or is to be submitted, to the High Court.[31]

75. The question might be along the following lines:[32]

[29] [2020] NSWCCA 48.
[30] At [24].
[31] *R v Kinghorm (No 6)* [2020] NSWSC 1028.
[32] At [3].

> Does the law as applied in *R v Leach* [2019] 1 Qd R 459, concerning the accusatorial principle, the companion rule and the application of those principles to answers compelled under taxation legislation, have the effect that investigative authorities and prosecuting authorities should not have disseminated and/or should not have had access to and/or should not have used the content of the accused's compulsory examination under s 264 of the *Income Tax Assessment Act 1936 (Cth)*, where the prosecution of the accused for offences contrary to section 135.1(7) of the Commonwealth Criminal Code may possibly occur or will occur and where the offences allegedly involve a course of conduct that included false or misleading statements made during the s 264 examination?"

DOES THE WHS ACT ABROGATE THE COMPANION PRINCIPLE?

76. The companion principle can be abrogated by express words or necessary intendment. Does the WHS Act abrogate the principle?

Approach to statutory interpretation

77. Provisions are to be given their ordinary and natural (or conventional) meaning that is appropriate having regard to the immediately surrounding words and their grammatical usage.[33] Section 33 of the *Interpretation Act* provides that a construction that promotes the purpose or object of the statute is to be preferred. It must be acknowledged, however, that a Statute may, expressly or impliedly, have a number of different, and potentially competing, purposes.[34]

78. Another important principle of interpretation is the principle of legality. As such, it is assumed that, absent clear language, Parliament did not intend to abrogate or curtail citizens' rights, including by the imposition of criminal statute and if so, only to the extent clearly delineated.[35]

79. Where there is ambiguity in the terms of the statute, recourse may be had to extrinsic materials as an aid to construction.

Relevant statutory provisions

80. Key statutory provisions have already been set out above, namely ss155 and 171-173.

81. As noted, direct use of compulsorily acquired material is prohibited by the WHS Act, while indirect use is not expressly prohibited. The decision by Parliament to prohibit only direct use (unlike the Commonwealth Act) provides support for the conclusion that there is no prohibition on an inspector using such information as part of the investigation and providing such evidence to those conducting a prosecution.

82. Further relevant statutory provisions include:

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[33] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] per McHugh, Gummow, Kirby and Hayne JJ; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; s. 6 *Interpretation Act 1987*.
[34] *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* [2013] HCA 36.
[35] *Coco v The Queen* (1994) 179 CLR 427.

a. Section 3(1), objects, including (a) to protect workers through elimination of risks; and (e) securing compliance through effective and appropriate compliance and enforcement measures;

b. Section 152, which provides the functions of the regulator, including to monitor and enforce compliance with the Act and to conduct proceedings under the Act before a court;

c. Section 153 which states the powers of the regulation include "all things necessary or convenient to be done for or in connection with the performance of its functions";

d. Section 230, which states that prosecutions can only be brought by nominated persons, which includes the regulator or an inspector;

e. Section 230(1A) which permits a legal practitioner to bring proceedings.

83. What is apparent from ss152 and 230 (and the structure of the Act as a whole) is that Parliament has determined that the regulator will be an agency that monitors and enforces compliance under the Act and is to conduct prosecutions.

84. Further, s160 provides that inspectors are to both obtain material, including compulsorily, and be involved in, or take, proceedings:

> **160 Functions and powers of inspectors**
>
> An inspector has the following functions and powers under this Act—
>
> (a) to provide information and advice about compliance with this Act,
>
> (b) to assist in the resolution of—
>
> (i) work health and safety issues at workplaces, and
>
> (ii) issues related to access to a workplace by an assistant to a health and safety representative, and
>
> (iii) issues related to the exercise or purported exercise of a right of entry under Part 7,
>
> (c) to review disputed provisional improvement notices,
>
> (d) **to require compliance with this Act through the issuing of notices**,
>
> (e) **to investigate contraventions of this Act and assist in the prosecution of offences**,
>
> (f) to attend coronial inquests in relation to work-related deaths and examine witnesses.

85. What is apparent from s160 is that investigators are both empowered to issue notices (including compulsory notices) and conduct investigations and assist in the prosecution of offences. As with the regulator, there has been no attempt by Parliament to separate out the functions of investigation as against prosecution. This is a significant matter in construing whether, by necessary implication, the compulsory power provisions are designed to be confined only to those involved in the investigation and not those involved in any prosecution.

86. Finally, of relevance are the provisions in the Act which provide that information that is compulsorily obtained is to be kept confidential and which govern to whom and in what circumstances such confidential information can be disseminated:

> **271 Confidentiality of information**
>
> (1) **This section applies if a person obtains information or gains access to a document in exercising any power or function under this Act (other than under Part 7).**
>
> (2) **The person must not** do any of the following—
>
> (a) **disclose to anyone else**—
>
> (i) **the information**, or
>
> (ii) **the contents of or information contained in the document**,
>
> (b) give access to the document to anyone else,
>
> (c) **use the information or document for any purpose**.
>
> Maximum penalty—
>
> (a) in the case of an individual—115 penalty units, or
>
> (b) in the case of a body corporate—575 penalty units.
>
> (3) **Subsection (2) does not apply to the disclosure of information, or the giving of access to a document or the use of information or a document**—
>
> (a) about a person, with the person's consent, or
>
> (b) **that is necessary for the exercise of a power or function under this Act**, or
>
> (c) **that is made or given by the regulator or a person authorised by the regulator if the regulator reasonably believes the disclosure, access or use**—
>
> (i) is necessary for administering, or monitoring or enforcing compliance with, this Act, or
>
> (ii) is necessary for the administration or enforcement of another Act prescribed by the regulations, or

(iii) is necessary for the administration or enforcement of another Act or law, if the disclosure, access or use is necessary to lessen or prevent a serious risk to public health or safety, or

(iv) is necessary for the recognition of authorisations under a corresponding WHS law, or

(v) is required for the exercise of a power or function under a corresponding WHS law, or

(d) that is required by any court, tribunal, authority or person having lawful authority to require the production of documents or the answering of questions, or

(e) **that is required or authorised under a law**, or

(f) to a Minister.

(3A) Without limiting subsection (3), any information or document, including the following information or documents, lawfully obtained or accessed by a person exercising a power or function under this Act may be disclosed or given under subsection (3)(c)(v) to a corresponding regulator—

(a) information provided, or a document produced, under section 155 or Part 9,

(b) information or a document that is personal information or health information about an individual despite the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002*.

(4) A person must not intentionally disclose to another person the name of an individual who has made a complaint in relation to that other person unless—

(a) the disclosure is made with the consent of the complainant, or

(b) the disclosure is required under a law.

Maximum penalty—

(a) in the case of an individual—115 penalty units, or

(b) in the case of a body corporate—575 penalty units.

271A Information sharing between regulators

(1) Either one of the regulators or a member of staff of either one of the regulators is authorised to disclose information or give access to a document to the other regulator or a member of staff of the other regulator if the disclosure or giving of access is for the purpose of assisting the other regulator to exercise the powers or functions of the other regulator under this Act or the *Work Health and Safety (Mines and Petroleum Sites) Act 2013*.

(2) Section 271 applies to the use of information or a document that a person obtains or gains access to as a result of the disclosure of the information or the giving of access to the document as authorised by this section, as if the person had obtained the information or gained access to the document in exercising a power or function under this Act.

(3) Section 271 (2) does not apply to the disclosure of information or giving of access to a document as authorised by this section.

Relevant extrinsic material

87. The Explanatory Note accompanying the Bill referred to the Explanatory Memorandum to the Model WHS Act.[36] In respect of s172, the following explanation for the powers were given in the Explanatory Memorandum to the Model WHS Act:

> **Clause 155 – Powers of regulator to obtain information**
>
> 544. Clause 155 sets out the powers of the regulator to obtain information from a person in circumstances where the regulator has reasonable grounds to believe that the person is capable of:
>
> - giving information
> - producing documents or records, or
> - giving evidence
>
> …
>
> **Clause 171 – Power to require production of documents and answers to questions**
>
> …
>
> 604. Paragraph 171(1)(c) authorises inspectors to require persons at workplaces to answer any questions put by them in the course of exercising their compliance powers.
>
> …
>
> **Clause 172 – Abrogation of privilege against self-incrimination**
>
> 611. The Bill seeks to ensure:
>
> - that the strongest powers to compel the provision of information currently available to regulators across Australia are available for securing ongoing work health and safety, and
> - that the rights of persons under the criminal law are appropriately protected.

[36] The Bill includes a note under the 'Overview of the Bill' that 'At the Safe Work Australia Members' meeting of 2 December 2010, members agreed to the Explanatory Memorandum to the Model Work Health and Safety Act available at…'

612. Subclause 172(1) clarifies that there is no privilege against self-incrimination under the Bill, including under clauses 171 (Power to require production of documents and answers to questions) and 155 (Powers of regulator to obtain information).

613. This means that persons must comply with requirements made under these provisions, even if it means that they may be incriminated or exposed to a penalty in doing so.

614. These arrangements are proposed because the right to silence is clearly capable of limiting the information that may be available to inspectors or the regulator, which may compromise inspectors' or the regulator's ability to ensure ongoing work health and safety protections. Securing ongoing compliance with the Bill and ensuring work health and safety are sufficiently important objectives as to justify some limitation of the right to silence.

615. Subclause 172(2) instead provides for a 'use immunity' which means that the answer to a question or information or a document provided by an individual under clause 171 is not admissible as evidence against that individual in civil or criminal proceedings. An exception applies in relation to proceedings arising out of the false or misleading nature of the answer information or document.

88. The reports of the national review into model occupational health and safety laws that resulted in the Model WHS Act (**OHS Review**) included a number of recommendations with respect to self-incrimination.[37] Those included:

a. **Recommendation 180**: **A person should not be entitled to rely on a privilege against self-incrimination** in response to a request for information by an inspector for the purpose of enforcing ongoing compliance and securing health and safety;

b. **Recommendation 181**: The requirement that a person answer questions, and the unavailability of a privilege against self-incrimination, for the purpose of enforcing ongoing compliance and securing health and safety, should be subject to:

i. a specific prohibition against the use of the information in any proceedings against the person providing the information for a breach of the model Act or regulations;

ii. the inspector being required to inform the person from whom the information is sought that—

1. the information is required for the purpose of ensuring compliance and ongoing health and safety protection,

[37] Recommendation 181 of the National Review into Model Occupational Health and Safety Laws – First Report October 2008, National Review into Model health and Safety Laws, Second Report January 2009. The reports are referred to in the Explanatory Note to the Bill.

2. the person must answer the questions and provide the information,

3. the privilege against self-incrimination is not an excuse for failing to answer the questions or provide the information,

4. the information may not be used in any proceedings against the person for a breach of the model Act or regulations, and

5. LPP may apply to the information that is being sought;

iii. in the absence of the inspector providing the information referred to in (ii) above, it should be assumed that the information has been requested for the purposes of the investigation of a breach of the model Act or regulations; and

iv. if the inspector does not provide the information noted in (ii) above, any information obtained or discovered by reason of the provision of the information by the person shall not be able to be used in proceedings against that person for a breach of the model Act or regulations.

c. **Recommendation 188**: The model Act should require that a person answer questions asked by an inspector investigating a breach of the model Act or regulations.

d. **Recommendation 188**: The privilege against self-incrimination should be available to a natural person in response to a request for information or questions asked for the purpose of investigating a breach of the model Act or regulations.

e. **Recommendation 189**: The privilege against self-incrimination should be available to a natural person in response to a request for information or questions asked for the purpose of investigating a breach of the model Act or regulations.

89. The Model WHS Act and NSW Parliament did not, however, adopt any such distinction between the application of self-incrimination to 'enforcing ongoing compliance and securing health and safety' and 'investigating a breach of the model Act or regulations'. Instead, the privilege against self-incrimination does not apply in either circumstance, subject to the protections afforded in relation to admissibility in s172(2).

90. The OHS Review also identified and discussed the distinction between use immunity and derivative immunity. Relevantly, however, the OHS Review did not recommend any derivative use immunity, except to a limited extent in Recommendation 197, being that 'The model Act should provide that in the event of a failure by an inspector to give a required warning before requesting information from a person in the course of investigating a breach, a use immunity **and derivative use immunity** will apply to all information obtained by reason of the request.'

91. That recommendation was adopted in the Commonwealth Act, as noted, but not in the WHS Act.

Conclusion as to statutory construction

92. Courts have been slow to find that a statute abrogates the companion principle, absent express words to that effect. The WHS Act does not contain such express words. However, the better view is that it nevertheless *does* abrogate the principle by necessary intendment.

93. Parliament considered the privilege against self-incrimination and determined, for the purposes of ss155 and 171, to abrogate that privilege by providing powers to the regulator and inspectors to compel persons to provide certain information and documents. Parliament has struck a balance in ss172 and 173 by requiring that before the privilege can be abrogated, the person must first be warned about certain matters and Parliament has then determined that such information or documents cannot be used against the person in any proceedings. This provides direct use immunity. Given the explanatory material it seems clear Parliament made a choice not to also prohibit indirect use (cf the Commonwealth Act) which supports the view that it intended to permit the regulator to proceed with a prosecution even though it had knowledge obtained under compulsion.

94. Parliament has then also expressly considered the extent to which such materials should be permitted to be disseminated. It has provided for confidentiality other than in specified circumstances. However, Parliament has clearly permitted such compulsorily obtained information and documents to be disseminated for administering, or monitoring or enforcing compliance with, this Act (including, necessarily, prosecutions for offences under this Act).

95. By creating a body (the regulator) and an office (of inspector) that are entrusted as the sole repositories to exercise compulsory powers, and then *also* given them the powers to prosecute offences (one of a select group), it would appear that Parliament has by necessary implication abrogated the companion principle, at least with regard to the regulator and its inspectors. That is, dissemination within the regulator and its inspectors for any purpose provided for in s271(3) must be permissible.

96. Further, dissemination to the regulator's legal practitioners would appear to be permissible for any purpose contained in s271(3), noting the prosecutor's right to appear in the proceedings by practitioner.

CONCLUSION

97. It is a somewhat difficult construction to contend that once the regulator receives compulsorily obtained information from a natural person it can no longer exercise its prosecutorial powers under the Act against that person.

98. The intention of the legislature was to create a regime where such powers could be exercised by the regulator to investigate and prosecutions could then be brought by the regulator (with the protection that such materials could not be used against the

person prosecuted). The absence of any derivative use immunity, as well as the structure and objects of the Act, tell against such construction.

99. For these reasons, it would appear that notwithstanding the absence of express words, and notwithstanding the principle of legality, the more likely interpretation of the WHS Act is to conclude that it intends by necessary implication to abrogate the companion principle for the purposes of prosecutions brought under the Act by the regulator.

100. However, given the absence of express words of abrogation it is possible a court may determine the companion principle prevents a prosecution so long as the lawyers and/or witnesses are in possession of compulsorily acquired material. If that were the case a prosecution could be pursued only by lawyers and inspectors who have not been given that material.

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